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No. 90

IN THE

Supreme Court of the United States

OCTOBER TERM 1947

PEOPLE OF THE STATE OF ILLINOIS
ex rel. VASHTI MCCOLLUM,

Appellant,

vs.

BOARD OF EDUCATION OF SCHOOL DISTRICT NO. 71, CHAMPAIGN COUNTY, ILLINOIS, and ELMER C. BASH and ALICE J. BASH, and WANDA I. BASH, a minor, by ELMER C. BASH, her father and next friend,

Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF AMICI CURIAE AND MOTION

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SYNAGOGUE COUNCIL OF AMERICA
and
NATIONAL COMMUNITY RELATIONS ADVISORY COUNCIL.

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

MOTION FOR LEAVE TO FILE BRIEF AS AMICI CURIAE

TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The undersigned, as counsel for the Synagogue Council of America and the National Community Relations Advisory Council and on their behalf and on behalf of the organizations affiliated with them, respectfully moves this Court for leave to file the accompanying brief as Amici Curiae.

The Synagogue Council of America is a co-ordinating body consisting of the organizations representing the three

divisions of Jewish religious life: Orthodox, Conservative and Reform. It is composed of:

Rabbinical Council of America, representing the Orthodox rabbinate;
Union of Orthodox Jewish Congregations of America, representing the Orthodox congregations;
Rabbinical Assembly of America, representing the Conservative rabbinate;
United Synagogue of America, representing the Conservative congregations;
Central Conference of American Rabbis, representing the Reform rabbinate;
Union of American Hebrew Congregations, representing the Reform congregations.

The National Community Relations Advisory Council is a co-ordinating body consisting of the following national and local lay Jewish organizations concerned with American Jewish community relations:

American Jewish Committee
American Jewish Congress
B'nai B'rith (Anti-Defamation League)
Jewish Labor Committee
Jewish War Veterans of the United States
Union of American Hebrew Congregations
Akron Jewish Community Council
Jewish Public Relations Council for Alameda and Contra Costa Counties, California
Baltimore Jewish Council
Jewish Community Council of Metropolitan Boston
Jewish Community Council, Bridgeport, Conn.
Brooklyn Jewish Community Council
Cincinnati Jewish Community Council
Jewish Community Council, Cleveland, Ohio
Detroit Jewish Community Council
Jewish Community Council of Essex County, New Jersey
Indiana Jewish Community Relations Council
Public Relations Council of the Jewish Federation of Indianapolis
Community Relations Bureau of the Jewish Federation and Council of Greater Kansas City
Los Angeles Jewish Community Committee

Milwaukee Jewish Council
Minnesota Jewish Council
New Haven Jewish Community Council
Philadelphia Jewish Community Relations Council
Jewish Community Relations Council, Pittsburgh
Jewish Community Council, Rochester
Jewish Community Relations Council of St. Louis
Jewish Survey and B'nai B'rith Community Committee of San Francisco
Southwestern Jewish Community Relations Council
Jewish Community Council of Springfield, Mass.

The organizations affiliated with the Synagogue Council of America and the National Community Relations Advisory Council include in their membership more than eighty percent of Americans affiliated with Jewish organizations. We believe, therefore, that in submitting this brief we speak for American Jewry.

The issue presented to this Court in this case is the constitutional validity of a system under which sectarian religious instruction is conducted within public school buildings during regular school hours. At the beginning of our brief we set forth the importance of the issue to American Jewry. Here we state only that this is the first instance in which practically all American Jewish organizations, religious and lay, have joined in submitting a brief.

We have sought, but have been unable to obtain, the consent of counsel for the parties to the filing of this brief.

Dated: New York, N. Y., October 24, 1947.

HENRY EPSTEIN,
Attorney for
SYNAGOGUE COUNCIL OF AMERICA
and
NATIONAL COMMUNITY RELATIONS
ADVISORY COUNCIL.

IN THE

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Appellees.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF OF AMICI CURIAE

Interest of the Amici

This brief is presented on behalf of the Synagogue Council of America and The National Community Relations Advisory Council, comprised of the organizations listed in the foregoing motion.

There are many reasons why we are gravely concerned with the issues in this case. We regard the principle of separation of church and state as one of the foundations of American democracy. Both political liberty and free-

dom of religious worship and belief, we are firmly convinced, can remain inviolate only when there exists no intrusion of secular authority in religious affairs or of religious authority in secular affairs. As Americans and as spokesmen for religious bodies, lay and clerical, we therefore deem any breach in the wall separating church and state as jeopardizing the political and religious freedoms that wall was intended to protect. We believe, further, that our public school system is one of the most precious products of our American democracy. We are, therefore, impelled to voice our opposition whenever attempts are made to compromise its integrity. The divisiveness which inevitably results whenever sectarianism enters the public school affects all American children, but is particularly harmful to children of minority faiths.[1] Jewish groups

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[1] Attempts to invoke the power of the state in support of religion have invariably brought religious conflict and sectarian strife in their wake. As early as 1785 Madison declared that the "very appearance of the [Assessment] Bill has transformed that 'Christian forbearance, love and charity' which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased." Madison's *Memorial and Remonstrance Against Religious Assessments*, par. 11, annexed as appendix to *Everson* v. *Board of Education of the Township of Ewing*, 330 U. S. 1 (1947). The purpose of the Bill was to establish the Christian religion in Virginia by supporting religious teachers through tax raised funds.

For indications of Protestant-Catholic tensions engendered by demands that parochial schools share in federal funds proposed for public schools, see: Oxnam, *Federal Funds and Parochial Education*, The Churchman (March 1, 1947) 13; *Federal Aid to Sectarian Education*, Federal Council of Churches of Christ in America (April, 1947); *Hearings before Senate Committee on Education and Labor on S. 717 and S. 181*, 79th Cong., 1st Sess. (1945) 914-931; *Hearings before House Committee on Education and Labor on Federal Aid to Education*, 80th Cong., 1st Sess. (1947) 300-357, 423-427. The decision of this Court in the *Everson* case has itself evoked considerable inter-religious animosity. See, e.g., Editorial, *The Protestants Get a Licking*, The Churchman (March 1, 1947) 4; Editorial, Commonweal, March 14, 1947; N. Y. Times, Feb. 12, 1947, p. 27; *id.* June 12, 1947, p. 1; *id.* June 16, 1947, p. 8. Recently, the incorporation of a Catholic school into the public school system at North College Hill, a suburb of Cincinnati, resulted in riots, bloodshed and intra-communal hatred.

base their opposition to the released time program on many grounds, but no consideration bulks larger in that opposition than the divisive effects of the program.[2] Thoughtful Christians are no less concerned with this harmful aspect of released time.[3]

In an editorial the magazine *Frontiers of Democracy* accurately described the results of the introduction of sectarianism into the public schools:[4]

> It will subject children of minority groups to grave injustices. * * * The obvious attention to religious differences which religious instruction will promote cannot fail to fan the flames of intolerance in every community where a religious minority exists. In overwhelmingly Protestant communities the finger of deviation will point to the Catholic. In Catholic populations the child of Protestant parents will creep unwillingly to his religious teacher. It needs no psycholo-

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Fey, *Preview of a Divided America*, Christian Century. (May 28, 1947) 682-684; Fey, *They Stand For Free Schools*, Christian Century (July 2, 1947) 824; Cincinnati Post, July 17, 1947, p. 1.

When introduction of the released time program was first proposed in New York City in 1917 riots actually broke out. Howlett, *Released Time for Religious Education in New York City*, Religious Education (March-April 1942) 104-108.

[2] See, Editorial, *Public School Time for Religious Education*, Jewish Education (January, 1941) 130-132.

[3] An eminent Protestant observer remarks: "When procedure to line up the youngsters for their 'religion' classes segregates Americans as Catholics, Lutherans, other Protestants, Jews, cultists, smaller sects, non-churchgoing pupils, a consciousness of religious cleavage is inevitable and it is baneful. * * * The religious disunity of the proponents of dismissed time plans is one of the principal arguments against released time. Released time not only divides public school students into four major groups, Catholics, Protestants, Jews and the majority or minority that remains behind in the classrooms, but it also breaks up Protestant against fundamentalist Protestant, cultist against sectarian enthusiast, Lutheran against Baptist. When weekday church school sessions are held in schoolrooms, they often become catechism against catechism." Moehlman, SCHOOL AND CHURCH: THE AMERICAN WAY (3rd ed. 1944).

[4] December 15, 1940, p. 72.

> gist to tell what disastrous harm will be done; the more sensitive parents are to the facts of child development, the more serious will their problem become. * * * It [the association of religious instruction with public education] will divide sections of a community, set family against family, foment friction within families where parents are of differing faith, and sow discord within the normal relationships children create in their neighborhood.

The division of public school children according to their religious beliefs is by no means the only unfortunate consequence of this encroachment of sectarianism upon the public schools. Equally harmful are some of the teachings in the released time classes, particularly when they are given the sanction and authority of the school system. The stigmatizing effect of teaching Jewish participation in the crucifixion has been acknowledged by many students of the subject.[5] Such teaching was included in the religious education classes in Champaign (R. 95-98). This Court can readily imagine the effect of such teachings in the presence of his public school teacher upon the relationship between a Jewish boy and his Christian classmate.

Champaign is not unique in this respect. There is ample evidence that the teachings in religious courses foster antagonisms between Christians and Jews, between Protestants and Catholics and even among various Protestant sects.[6]

We do not suggest that the state exercise any control over the content of religious instruction in church schools.

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[5] Valentin, ANTI-SEMITISM (1936) 13-14; Brown, *The Origin of the Anti-Semitic Attitude* in JEWS IN A GENTILE WORLD (1942) 134-135; Freeman, *The Motivation of Jew-Gentile Relationships*, *id.* at 165; Clinchy, *Borderline of Prejudice*, Christian Century (May 14, 1930) 623-627.

[6] Beckes, *Weekday Religious Instruction: Help or Hindrance to Inter-Religious Understanding*, National Conference of Christians and Jews, Human Relations Pamphlet No. 6 (1946) 8, 13-16; Public Education Association, *Released Time for Religious Education in New York City Schools* (1943) 13; *id.* (1945) 14; Oxnam, *supra* note 1, at 14.

If the effects of some of this instruction are productive of frictions the problem is one for religious authorities and educators, and not the state. This is part of the price we pay for religious liberty and we would not have it otherwise. But when these teachings are brought into the public school system they are given the authoritative sanction of that system. The inevitable effect is to bring about the very evil which those who framed the amendment guaranteeing religious liberty strove above all else to avoid.[7]

For these and other reasons we have consistently opposed the encroachment of religious instruction or worship on the field of public education. We are fully aware of and greatly respect the depth of conviction and sincerity motivating those who seek to invoke the aid of the public school system in meeting the problem of religious illiteracy. The crucial issues involved and consistent adherence to the principles to which we subscribe, however, compel us to submit this brief.

Our opposition to religious instruction within the public school must in no way be interpreted as hostility to religious instruction as such. In Jewish history and tradition religious instruction has always been regarded as a most sacred responsibility. The overwhelming majority of Jewish children voluntarily attend after-hour and Sunday schools conducted by the local Jewish communities where they receive their religious education wholly independent of

[7] "The great danger, however, in giving time off during school hours for religious instruction is not merely that there would be too great a loss of time from secular education but that there would be a temptation for ambitious ecclesiastics of every kind to propagate under the protection of public school auspices their own peculiar notions of religious training, that there would be a possible conflict among the children themselves in prying into each other's religious affiliations, that the door would be opened to every form of intolerance and bigotry that has plagued mankind under the guise of religion—potential dangers that must not threaten our public school system." Johnson, LEGAL STATUS OF CHURCH-STATE RELATIONSHIPS IN THE UNITED STATES (1934) 129-130.

the public school system.[8] We believe that the responsibility for religious education may not and should not be shared by the public school system. American Jewry are not prepared to concede the spiritual insolvency implicit in such a division of responsibility.[9]

We wish to make clear our regret that the appellant chose to use this case as a medium for the dissemination of her atheistic beliefs and injected into the record the irreligious statements it contains. We wish not only to dissociate ourselves completely from the anti-religious views of the appellant, but wish also to deplore the fact that the sponsors of the original petition chose this case as a means of inscribing such anti-religious matter on the public record and for confusing the basic issue in this case by dragging into it the unrelated issues of atheism versus religion.

But because we believe that the issue in this case is of paramount importance to Jews, we have overcome our natural reluctance to join in a case the record of which is replete with anti-religious matter. We feel that a failure on our part to do our utmost to persuade this Court that the decisions of the courts below must be reversed would

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[8] It is estimated that three out of every four Jewish children in the United States receive religious instruction at some time or another. Jewish Education Association of New York, *Twenty-Five Years of Jewish Education in the U. S.*, American Jewish Year Book (1936-1937) 104; Hurwich, *Religious Education and the Release Time Plan*, Jewish Education (1941) 103-107.

[9] See Madison's *Remonstrance*, *supra* note 1, at par. 6:

> It is moreover to weaken in those who profess this Religion a pious confidence in its innate excellence, and the patronage of its Author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies, to trust it to its own merits.

See also Williamson, *Religion and the Public Schools*, The Churchman (August, 1947) 10:

> The only construction that can be placed upon Protestant advocacy of sectarianism in public school education is an admis-

be an inexcusable dereliction in our duty to American Jewry. We would have preferred to have the issue presented to the Court shorn of any anti-religious irrelevancies. We are aware that men of ill-will and even many unthinking persons may distort our defense of the appellant's right to have her child attend a public school in which he is free from religious indoctrination of any kind and from any compulsion to attend religious instruction therein into a defense of her atheistic dogmas. But the issue is before the Court in this case and the choice of how best to present it to the Court is not ours. The importance of the issue to Jews not only in terms of its freedom of worship but also in terms of its defense of our democratic system overrides all other considerations and compels our intercession regardless of the risk of unjust defamation.

Statement of the Case

The appellant, Vashti McCollum, resident and taxpayer of Champaign School District No. 71, Illinois, and mother of a ten-year-old child attending a public school in that district, brought suit in the Circuit Court of Champaign County for a writ of mandamus directing appellees, the District Board of Education, to prohibit religious instruction within the public schools of the district (R. 1, 17). After trial the Circuit Court rendered judgment denying the petition (R. 89). The Supreme Court of Illinois affirmed (R. 280) and allowed appeal to this Court (R. 283), which, on June 2, 1947, noted probable jurisdiction (R. 285).

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sion of weakness. Are Protestant parents unable to lead their children toward religion in their own homes? And what of the churches? If Sunday school attendance has fallen off to an alarming extent, what is the reason for it? Why can we not emulate our Jewish friends, many of whose children receive intensive religious instruction after school hours? Finally, have we so little faith in the American way of life, that we would willingly lend ourselves to practices that tend to undermine it?

Statement of Facts

The "released time" plan for weekday religious instruction[10] had its origin in Gary, Indiana, in 1913 when the then Superintendent of Schools directed the dismissal of children an hour earlier one day of each week to enable them to pursue their individual interests such as religion, music or art. Church leaders took advantage of this plan to establish classes in religious instruction during that hour and sought to induce attendance at these classes by the dismissed children. Later, other communities undertook similar programs, but on the urging of church leaders, the school authorities dismissed only those children who indicated their intention to attend classes in religious education. The next step in the development of the "released time" plan was the practice of releasing children in the middle of the school day, rather than, as formerly, at the end of the day. The instant case illustrates still another step in the consistently growing encroachment of the released time plan on the public school system—the bringing of religious instruction into the public school classroom during regular school hours.[11]

Religious instruction was instituted in Champaign in the fall of 1940 under a "released time" plan sponsored by the

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[10] The term is referred to at R. 187, 188, 190.

[11] Although only twelve states (California, Indiana, Iowa, Maine, Kentucky, Massachusetts, Minnesota, New York, Oregon, Pennsylvania, South Dakota and West Virginia) have statutes permitting release of public school children for religious instruction, there is evidence that the plan is in operation in varying degrees in several other states.

There is no agreement as to the number of public school children enrolled in "released time" classes, estimates varying from one to two and a half million. Davis, *Weekday Classes in Religious Education*, U. S. Office of Education (Bulletin 1941, No. 3) 24; National Education Association, *The State and Sectarian Education*, Research Bulletin (Feb., 1946) 36; Shaver, *The Movement for Weekday Religious Education*, Religious Education (Jan.-Feb., 1946). There were 24,562,473 pupils enrolled in American public schools in 1942, the last year for which figures are available. STATISTICAL ABSTRACT OF THE UNITED STATES, U. S. Dept. of Commerce (1946) 130.

Champaign Council on Religious Education, an interfaith committee, then composed of representatives of some of the local Protestant, Catholic and Jewish religious groups.[12] This plan was modeled upon the principles sponsored by the International Council of Religious Education[13] (R. 160), with, however, one fundamental difference: the religious instruction classes were conducted *within* the public school building,[14] whereas the International Council advises against this practice.[15]

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[12] The record does not indicate to what extent Catholic and Jewish religious bodies were represented on the Champaign Council. In view of the opposition to released time of American Jewry and the non-participation of Jewish groups in the Champaign program in the last two years, it is probable that Jewish representation was not large or significant. The record does establish that among the Protestant groups, only Methodists, Presbyterians, Episcopalians, Disciples of Christ, Baptists and some Congregationalist churches were represented (R. 129). Among Protestant groups in Champaign, at least Lutherans, Quakers, Unitarians, Jehovah's Witnesses and some Congregationalist churches were unrepresented (R. 122-124-125, 218-221).

[13] The International Council of Religious Education is a Protestant organization of clergymen, religious educators and laymen organized to help promote religious education, principally through weekday religious instruction.

[14] The National Education Association reported in 1946 that only in nine states were released time classes held within public school buildings to the knowledge of state superintendents of education. National Education Association, *supra* note 11, at 36. On the other hand, the U. S. Office of Education estimated in 1940 that, on the primary school level, approximately 40% of the released time classes are held within public school buildings, while 30% are held within the public school buildings on the high-school level. Davis, *supra* note 11, at 27. However, of the almost 25,000,000 elementary and high school pupils only 164,073 were reported to the Office of Education to be attending released time classes. *Id.* at 24. It is significant that when "released time" or "excusing children for religious instruction" is spoken about by students of the problem, it is generally assumed that the religious instruction is conducted off the public school premises. See, *e.g.*, National Education Association, *supra* note 11, at 29; Johnson, *supra* note 7, at 129.

[15] Shaver, *Remember the Weekday—To Teach Religion Thereon*, International Council of Religious Education (undated).

Under the plan instructors engaged by the Champaign Council obtained permission from appellees to enter the ten elementary schools and the single junior high school in the district for the purpose of conducting religious education classes during regular school hours (R. 267). Thirty-five religious education classes were being held in the Champaign public schools at the time of the trial of this suit; thirty-one were Protestant; four Catholic (R. 91). There had been no classes in Jewish religion for at least two years (R. 224). The instructors in religion were engaged by the Champaign Council (R. 93), subject to the approval and supervision of appellees' superintendent of schools (R. 127).

At the beginning of each term, cards were distributed to the public school children by their regular teachers on which parents could indicate their consent to the enrollment of their children in the religious instruction classes (R. 176). Children who obtained such consent were released by the school authorities from their secular work for a period of thirty minutes each week in the elementary schools and forty-five minutes in the junior high school (R. 62). If the majority of children in a particular class participated in the religious instruction they remained in their regular classroom; the children who did not participate were sent to other parts of the school building, sometimes accompanied by their regular teachers and sometimes not (R. 62). Only the Protestant instruction was conducted within the regular classroom; where children were released for Catholic or Jewish instruction they left their classroom with their respective religious teacher for instruction in some other part of the building (R. 150). When the religious instruction was conducted in the regular classroom, which was apparently the usual place (R. 63), the regular teacher frequently, if not always, remained at her desk during the instruction period (R. 137). At the end of the session the religious instructor left the classroom, the children who had participated in Catholic or Jewish instruction or who had not participated in any religious in-

struction returned, and regular class work was resumed (R. 63).

During the first half of the 1944-1945 school year appellant's son, James Terry McCollum, and one other boy, Elwin Miller, were the only ones in their class who did not participate in the religious education class; during the second half only appellant's son did not participate. All attended the Protestant class. In the public school attended by the McCollum boy, as in eight of the eleven public schools in Champaign, only Protestant instruction was given (R. 150) and the trial court found that Catholic and Jewish children attended the Protestant classes (R. 65). Terry McCollum's secular teacher, Mrs. Taylor, regularly remained at her desk while the religious instruction was being given. On one occasion appellant's son was placed at a desk in the hall where he was subjected to teasing and harassment by passing children who assumed that he was being punished, called him an atheist and jeered at him (R. 175, 185). On other occasions he was placed in an unoccupied room with the door closed (R. 193, 254), but, after a complaint by appellant, both practices were discontinued and he was thereafter sent to another fifth grade class where he remained until the thirty-minute religious instruction period was over (R. 68).

The Issue

By deleting the word "voluntary" from the statement of the Illinois Supreme Court, we can agree that the record "presents the simple question, does * * * the Federal constitution * * * in [its] guaranty of religious freedom, prohibit *voluntary* religious classes in the public schools under the plan as disclosed by this record?" (R. 279). In more general terms the question presented to this Court is whether a statute or regulation permitting religious instruction in public school classrooms during school hours is a law respecting an establishment of religion within the prohibition of the First and Fourteenth Amendments.

Related to this issue but, we believe, unnecessary for its determination is the question of the validity of the released time program as it is generally effected by conducting the religious instruction classes off the school premises.[16] Nor is it necessary for the Court to determine the constitutionality of permitting the use of public school buildings for religious instruction or worship after regular school hours and completely independent of public school auspices.[17]

Summary of Argument

We urge that in permitting the intrusion of religion into the public school system by classes devoted to religious instruction or worship on public school premises during regular school time allotted for that purpose by public school authorities, Illinois, through a local board of education, has made a law respecting establishment of religion in violation of the First and Fourteenth Amendments of the Constitution.

We submit that the released time program disclosed by the record violates the Constitution in that the state thereby

1. Prefers one religion over another in addition to aiding all religions;
2. Influences and compels children to attend religious instruction against their parents' will and their own;
3. Renders financial aid to sectarian instruction;
4. Participates in religious instruction.

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[16] *Cf. People ex rel. Lewis* v. *Graves*, 245 N. Y. 195 (1927); *Stein* v. *Brown*, 125 N. Y. Misc. 692 (1925); *People ex rel. Latimer* v. *Board of Education*, 394 Ill. 228 (1946); *Gordon* v. *Board of Education*, — Cal. (2d) —, 178 P. (2d) 488 (1947).

[17] *Cf.* 5 A. L. R. 866, 886 *et seq.*; National Education Association, *supra* note 11, at 20; Johnson, *supra* note 7, ch. X.

Argument

The extreme limits of a state's power under the "establishment of religion" clause of the First Amendment were defined explicitly by this Court in *Everson* v. *Board of Education of the Township of Ewing*.[18] It declared that since the "Amendment requires the state to be neutral in its relations with groups of religious believers and non-believers," unneutral acts would transgress these limits. In that case the Court spelled out the types of state conduct which "favor" religions and thus transcend the limits of state power. The Court said:[19]

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. *Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person* to go to or to remain away from church against his will or force him *to profess a belief or disbelief in any religion.* No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. *No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.* In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State." (Emphasis added.)

We believe that permitting religious instruction in the public school violates each of these italicized prohibitions.

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[18] 330 U. S. 1 (1947).

[19] *Id.* at 15-16.

POINT I

The First and Fourteenth Amendments prohibit not only State action which prefers one religion over another but also State action which aids all religions.

A. Even if religious instruction during school hours within the public school does not prefer one religion over another, it is unconstitutional since it aids all religions.

Much is made by appellees and the Illinois Supreme Court of the claim that no preference is accorded to any particular sect but that all may partake of state aid on equal terms (R. 62, 269). We shall later demonstrate this claim is unreal. But even if it were factually valid, its relevancy is limited at best to a determination of the extent of appellants' powers under the Illinois constitution. The concept of separation of church and state as embodied in the First Amendment is broader than the same concept as embodied in the Constitution of Illinois and of some of our other states.

This was expressly recognized by this Court in the *Everson* case when it held that the broad concepts of the First Amendment, as embodied in the Fourteenth, deprive the state of power not merely to aid "one religion" but to "aid all religions" as well, and prohibit it from deviating from neutrality "in its relations with groups of religious believers and non-believers." [20]

It is, of course, true that the separation of church and state as evolved in many of the states, and particularly in New England, was not a separation of religion from the state but a particular religion or sect. The constitutions of these states assume worship; they guarantee freedom in the choice of the form of that worship, but prohibit preference to any particular sect." [21] It was this limited con-

[20] 330 U. S. 1 (1947).

[21] See, *e.g.*, Constitutions of Connecticut (Art. VII, sec. 1), Florida (Preamble, sec. 6), Illinois (Art. II, sec. 3), New Hampshire (Art. 6th).

cept of separation which Illinois inherited and incorporated in its constitution and laws. The emphasis and underlying theme is upon non-preference among denominations. This limited concept explains appellees' insistence [22] that appellant's lack of religious belief places her beyond the pale of constitutional protection, a position which strikingly demonstrates the essentially unneutral position taken by appellees as between believers and non-believers in religious dogma. It explains also the Illinois Supreme Court's insistence that since the Champaign public school authorities are willing to confer their benevolent aid upon all religious groups desiring to participate in the plan for religious instruction within the public schools no constitutional prohibition was violated. The Illinois Supreme Court said (R. 279):

> Our government very wisely refuses to recognize a specific religion, but this cannot mean that the government does not recognize or subscribe to religious ideals. We find such recognition in the very preamble to our State constitution. The government does not recognize a particular faith but this does not mean that it is indifferent to religious faith. To deny the existence of religious motivation is to deny the inspiration and authority of the Constitution itself.

The concept of separation embodied in the First Amendment, however, followed the pattern of Virginia rather than New England. In Virginia the perseverance of Jefferson and Madison resulted in the adoption of a broader concept. The Virginia Assessment Bill in seeking to revive the tithes, suspended since 1777, specifically broadened the scope of its operation to include dissentient religious denominations by permitting free choice in designating "what society of Christians" was to receive each person's tax.[23]

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[22] Appellees' Brief before Supreme Court of Illinois, p. 26.

[23] James, THE STRUGGLE FOR RELIGIOUS LIBERTY IN VIRGINIA (1900) ch. X, XI; Eckenrode, SEPARATION OF CHURCH AND STATE IN VIRGINIA (1910) 91.

While this compromise caused substantial diminution in the opposition to the Bill, Madison's unyielding continuance of the struggle finally proved successful, the Assessment Bill died in Committee and Jefferson's Bill for Religious Freedom was finally enacted in 1786,[24] embodying the concept that religion is wholly exempt from the cognizance of civil society.[25]

B. The released time plan in Champaign and elsewhere does prefer some religions over others.

We submit that sectarian instruction within the public school during school hours necessarily results in according a preference to particular religious sects or dogma.

In the first place, the fact that Protestant religious instruction is conducted in the same classroom in which the regular classes are held (R. 137), whereas the Catholic children are required to leave the room and go to a basement room (R. 150), operates as an obvious preference.[26]

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[24] James, *supra* note 23, at 140.

[25] Madison's *Remonstrance, supra* note 1, at par. 1. An effort was made to amend the preamble to insert, "a departure from the plan of Jesus Christ, the Holy Author of our Religion," but the amendment was rejected by a great majority, "in proof," says Jefferson, "that they mean to comprehend within the mantle of its protection, the Jew and the Gentile, the Christian and the Mohamedan, the Hindoor and the Infidel of every denomination." 1 Jefferson's *Works* (Ford ed. 1892) 62. Jefferson's bitter opposition to the maxim that Christianity is a part of the law of the land is well known. *Id.* at 362.

[26] See also, *Herold* v. *Parish Board of School Directors*, 136 La. 1034, 1050 (1915):

> And excusing such children on religious ground, although the number excused might be very small, would be a distinct preference in favor of the religious beliefs of the majority, and would work a discrimination against those who were excused. The exclusion of a pupil under such circumstances puts him in a class by himself; it subjects him to a religious stigma; and all because of his religious belief. Equality in public education would be destroyed by such act, under a Constitution which seeks to establish equality and freedom in religious matters. The Constitution forbids that this shall be done.

But, far more important, it is clear that not every religious denomination is accorded the privilege of participating in the system. Discrimination results from the requirement that all applicant groups "work together" (R. 127) through the Champaign Council of Religious Education, which is composed of representatives only of the traditional Protestant, Catholic and Jewish faiths. This requirement, far from being unique to Champaign, is customary wherever released time is practiced.[27] It effectively eliminates participation not only by Jehovah's Witnesses,[28] a strongly evangelical group which would welcome an opportunity to enter the public schools, but by all groups espousing unpopular religious dogmas. It is not an accidental but an intended, inevitable consequence of the released time plan that there is no record of participation anywhere in the United States by religious groups other than those teaching traditional Protestantism, Catholicism, and, infrequently, Judaism. Indeed, the requirement of cooperation in curriculum content among the Protestant groups (R. 162) has operated in Champaign, as well as elsewhere, to render impossible participation by so traditional a group as the Lutheran Church (R. 122, 162). Thus Rev. Cartlidge of the Presbyterian Church, a member of the Champaign Council, testified (R. 162):

> I would welcome the Lutherans but the council reserves the right in its cooperative movement with the Lutherans represented upon it that no prejudicial personalities or materials be put in the courses. We intend to protect the courses against antagonistic matter being taught. As far as we are able to, we examine the material to be sure none is antagonistic to other religious organizations.

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[27] International Council of Religious Education, *The Weekday Church School*, Educational Bulletin No. 601 (1940) 2-3.

[28] See concurring opinion of Mr. Justice Jackson in *Douglas* v. *City of Jeannette*, 319 U. S. 157, 170-174 (1943), for an example of the teachings of Jehovah's Witnesses in respect to organized religions in general and the Catholic Church in particular.

Invoking aid of the public school system in furthering religious education inevitably results in preferential treatment to the particular sect dominant in the community. Many cases can be cited involving preference to Protestant teachings by use of the Protestant version of the Bible or Protestant hymns and prayers.[29] There are a large number of cases the effects of which can be construed as conferring preferential treatment to Catholic teachings, including permission to wear clerical garb by school teachers,[30] the incorporation of parochial schools into the public school system [31] and the furnishing of free textbooks for use in parochial schools [32] or free transportation to such schools.[33] All, we believe, establish that preferential treatment to particular sects is an inevitable consequence of sectarian intrusion upon the public school system.

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[29] See cases cited *infra* note 50.

[30] *Hysong* v. *Gallitzin Borough School District*, 164 Pa. 629 (1894); *Sargent* v. *Board of Education*, 76 N. Y. App. Div. 588 (1902); *Commonwealth* v. *Herr*, 229 Pa. 132 (1910); *Gerhardt* v. *Heid*, 66 N. D. 444 (1936).

[31] *State ex rel. Johnson* v. *Boyd*, 217 Ind. 348 (1940); *Gerhardt* v. *Heid*, 66 N. D. 444 (1936); *State ex rel. Public School Dist. No. 6* v. *Taylor*, 122 Neb. 454 (1932); *Collins* v. *Kephart*, 271 Pa. 428 (1921); *Knowlton* v. *Baumhover*, 182 Iowa 691 (1918); *Williams* v. *Trustees Stanton Dist.*, 173 Ky. 708 (1917); *Atchison, T. & S. F. Rld. Co.* v. *City of Atchison*, 47 Kans. 712 (1892); *Synod of Dakota* v. *State*, 2 S. D. 366 (1891); *State ex rel. Nevada Orphan Asylum* v. *Hallock*, 16 Nev. 373 (1882); *Jenkins* v. *Inhabitants of Andover*, 103 Mass. 94 (1869); *Hlebanja* v. *Brewe*, 58 S. D. 351 (1931); *Opinion of the Justices*, 214 Mass. 599 (1913).

[32] *Borden* v. *Louisiana State Board of Education*, 168 La. 1005 (1929); *Smith* v. *Donahue*, 202 N. Y. App. Div. 656 (1922); *Chance* v. *Mississippi State Textbook Board*, 190 Miss. 453 (1941); *Haas* v. *Independent School District*, 69 S. D. 303 (1943).

[33] *Everson* v. *Board of Education*, 133 N. J. L. 350 (1945); *Nichols* v. *Henry*, 301 Ky. 434 (1945); *State ex rel. Traub* v. *Brown*, 36 Del. 181 (1934); *Board of Education* v. *Wheat*, 174 Md. 314 (1938); *Judd* v. *Board of Education*, 278 N. Y. 200 (1938); *State ex rel. Van Straten* v. *Milquet*, 180 Wis. 109 (1923); *Gurney* v. *Ferguson*, 190 Okla. 254 (1941); *Mitchell* v. *Consolidated School District*, 17 Wash. (2d) 61 (1943); *Sherrard* v. *Jefferson County Board of Education*, 294 Ky. 469 (1942).

POINT II

By permitting religious instruction in the public schools during regular school hours the State is influencing and even compelling children to attend religious instruction and worship against the will of their parents and their own.

Compulsory attendance at religious worship or instruction violates both aspects of the First Amendment: it establishes religion and abridges the free exercise thereof. Appellees would not, of course, contend that they may constitutionally impose upon non-attendance at religious instruction a direct sanction such as expulsion from the public school system.[34] But the absence of such a direct and overt sanction does not necessarily render the choice of the child and his parents completely voluntary. If, by reason of circumstances within the control of the public school authorities the child may reasonably believe that by non-attendance he will incur the displeasure of the public school authorities, the result is constitutionally the same, even though no specific act of punishment is inflicted or even threatened. If, by reason of circumstances within the control of the public school authorities, the child who does not attend is singled out and subjected to harassment and discomfort, attendance cannot be said to be voluntary.[35]

[34] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943), but *cf.* text, at footnote 22, *supra*.

[35] Admittedly, the Supreme Court of Illinois found that "the religious education classes are voluntary" (R. 272), but the term was clearly used to distinguish the situation in the present case from that in *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910), wherein participation in religious worship was compulsory; the Illinois Court did not decide the point we stress here. In any event, any finding by the Illinois Court that attendance was voluntary would not be binding upon this Court, which must determine independently whether attendance was in fact voluntary. *Chambers* v. *State of Florida*, 309 U. S. 227, 228-229 (1940); *Pierre* v. *State of Louisiana*, 306 U. S. 354, 358 (1939).

The law recognizes that the difference between compulsory and voluntary is one of degree and that conduct in the in-between area may be the legal equivalent of one or the other depending upon the relationship of the parties. If the relationship is one of trust or dependence, conduct which otherwise might be deemed to constitute no more than a suggestion or invitation may be deemed the legal equivalent of a command.[36] This Court has already established that conduct on the part of a State short of compulsion is prohibited under the Constitution. Neither a state nor the Federal government, this Court said in the *Everson* case, "can force nor influence a person to go to or to remain away from church against his will".[37] Under the Champaign plan, and indeed wherever the public school welcomes the intrusion of sectarian religion, the child is certainly "influenced" within the meaning of this rule. The facts disclosed by the record establish that the pressures exerted upon a ten-year-old child, and through him on his parents, render impossible an unfettered choice.

In the first semester of the fifth year the McCollum boy and one other were the only children in the class who did not participate in religious education. In the second semester, only the McCollum boy failed to participate (R. 132). When Miss Chapin, the person designated by the Champaign Council on Religious Education to teach the Protestant classes, came into the class, he alone rose from his seat and left the room, to return thirty minutes later on Miss Chapin's departure (R. 133).

The exclusion from class, however, was but the beginning of the process whereby he was singled out as "not belonging". His mother's refusal to allow his participation—a refusal which must have seemed capricious and

[36] *Cf. International Association of Machinists v. NLRB*, 311 U. S. 72, 78 (1940): "Slight suggestions as to the employer's choice between unions may have telling effect among men who know the consequences of incurring that employer's strong displeasure."

[37] 330 U. S. 1, 15 (1947).

unreasonable to Mrs. Taylor, his public school teacher—posed the latter with an administrative problem which she was either unable or unwilling to solve without causing the boy pain and discomfort.[38] She obviously did not know what to do with him during the religious instruction period. She could not devote her time to him, for that would interfere with her joining in the religious instruction. Searching for a solution, she placed the boy at a desk in the hall, a procedure sometimes employed as a method of punishment (R. 193). Passing schoolmates teased him, believing that he was being punished for being an atheist and for not participating in religious instruction (R. 269), a misconception pregnant with significance.

Mrs. Taylor found nothing wrong with this arrangement and probably would have continued it, at least while the music room was being used (R. 257). The boy, however, came home crying as a result of the experience and his mother protested to the school authorities, thereby bringing an end to this practice (R. 193).

When the music room (which was next to the teachers' washroom) was unoccupied, Mrs. Taylor placed him there alone, making certain that the door remained closed (R. 255). Protests from appellant brought a stop to this practice, too, whereupon Mrs. Taylor finally arrived at what was undoubtedly, to her, the happy solution of depositing him with the other fifth grade teacher for the period of

[38] The problem of what to do with the unreleased school child is one of the insoluble problems of the system. In Syracuse, N. Y., the Board of Education merely directs that "schools are to avoid attractions * * * that may cause pupils who are regularly excused to remain in school" and leaves the rest to the ingenuity and discretion of the principal or teacher. *Religious Education on Excused School Time, Board of Education*, Syracuse, N. Y. (Sept., 1945). Elsewhere, the conscientious principal or teacher tries, as best she can, to balance the equities between those leaving and those remaining. Davis, *supra* note 11, at 55; Public Education Association, *supra* note 6 (1945) at 10-11. Less conscientious teachers, however, are likely to adopt the expedient procedure employed by Mrs. Taylor, frequently referred to in the profession as "dumping."

religious instruction (R. 257), with the result that the latter's pupils too observed the consequence of heterodoxy. A child does not relish being singled out as different, particularly where the difference consists of not participating in activities approved and encouraged by public authorities. The regular teacher's presence in the class established in the children's eyes that religious education was not merely socially acceptable, but approved. In a ten-year-old child fear of being singled out as a nonconformist is a potent determinant of conduct.[39] In a case involving Bible reading and prayer recitation in public school, the Illinois Supreme Court itself acknowledged this, stating:[40]

> The Kentucky and Kansas decisions seem to consider the fact that the children of the complainants were not compelled to join in the exercises as affecting the question in some way. That suggestion seems to us to concede the position of the plaintiffs in error. The exclusion of a pupil from this part of the school exer-

[39] *Cf.* Prescott, EMOTION AND THE EDUCATIVE PROCESS (1938) 117; Plant, PERSONALITY AND THE CULTURAL PATTERN (1937) 277, 278, 288; Nimkoff, THE CHILD (1934) 111.

[40] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 351 (1910); see too, the following cases, also involving Bible reading and worship: *State ex rel. Weiss* v. *District Board*, 76 Wis. 177, 199-200 (1890):

> When * * * a small minority of the pupils in the public school is excluded, for any cause, from a stated school exercise, particularly when such cause is apparent hostility to the Bible which a majority of the other pupils have been taught to revere, from that moment the excluded pupil loses caste with his fellows, and is liable to be regarded with aversion and subjected to reproach and insult. But it is a sufficient refutation of the argument that the practice in question tends to destroy the equality of the pupils which the constitution seeks to establish and protect, and puts a portion of them to serious disadvantage in many ways with respect to the others.

Knoxlton v. *Baumhover*, 182 Iowa 691, 699-700 (1918):

> Conceding, for argument's sake, that such attendance was voluntary, in the sense that no requirement or command was laid upon non-Catholic pupils to attend or take part in such exer-

> cises in which the rest of the school joins, separates him from his fellows, puts him in a class by himself, deprives him of his equality with the other pupils, subjects him to a religious stigma and places him at a disadvantage in the school, which the law never contemplated. All this is because of his religious belief. If the instruction or exercise is such that certain of the pupils must be excused from it because it is hostile to their or their parents' religious belief, then such instruction or exercise is sectarian and forbidden by the constitution.

The trial court below in the present case also recognized the existence of a "natural embarrassment in being the only one in his room who did not take the religious education courses and who went out to study by himself because of that fact" (R. 69).

The framers of the First Amendment were clearly determined to put an end to what Madison called "that diabolical, hell-conceived principle of persecution".[41] The non-conformists who had fled Europe to escape persecution

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> cises; yet, surrounded as they were by a multitude of circumstances all leading in that direction, impelled by the gregarious instincts of childhood to go with the crowd, and impressed with a sense of respect for their teachers, whose religious principles and church affiliation were unceasingly pressed upon their notice by their religious dress and strictly ordered lives, could a reasonable person expect the little handful of children from non-Catholic families to do otherwise than to enter the invitingly opened door of the church, and receive, with their companions, the instructions there given?

Kaplan v. *Independent School District of Virginia*, 171 Minn. 142, 155-156 (1927) (dissent):

> To excuse some children is a distinct preference in favor of those who remain and is a discrimination against those who retire. The exclusion puts a child in a class by himself. It makes him religiously conspicuous. It subjects him to religious stigma. It may provoke odious epithets. His situation calls for courage.

[41] Letter to Bradford, January, 1774, 1 WRITINGS OF JAMES MADISON (1900) 11.

for religious beliefs, themselves visited cruel punishment upon those refusing to conform to orthodox beliefs and practices.

This Court has stated: [42]

> The oppressive measures adopted, and the cruelties and punishments inflicted by the governments of Europe for many ages, to compel parties to conform, in their religious beliefs and modes of worship, to the views of the most numerous sect, and the folly of attempting in that way to control the mental operations of persons, and enforce an outward conformity to a prescribed standard, led to the adoption of the amendment in question.

Persecution and oppression are the almost invariable consequence of attempts by the state to promote sectarian dogma or aid sectarian groups.[43] "Cruel persecutions" as this Court has said, "were the inevitable result of government-established religions". [44] Discord and strife are the equally inevitable result of government-sponsored religious education.

During the early Colonial period the most common penalties inflicted were imprisonment, pillory and banish-

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[42] *Davis* v. *Beason*, 133 U. S. 333, 342 (1890); see also, *Reynolds* v. *United States*, 98 U. S. 145, 162-164 (1878). For a general survey of persecution because of religious beliefs in America, see: Cobb, RELIGIOUS LIBERTY IN AMERICA (1902) ch. 4, 5; Myers, HISTORY OF BIGOTRY IN THE UNITED STATES (1943) ch. 2; Sweet, STORY OF RELIGIONS IN AMERICA (1930) ch. 4, 5; Beard, BASIC HISTORY OF THE UNITED STATES (1944) 19-23; Beard, 1 RISE OF AMERICAN CIVILIZATION (1930) 60 *et seq.*

[43] "Torrents of blood have been spilt in the old world, by vain attempts of the secular arm to extinguish Religious discord, by proscribing all difference in Religious opinions." Madison's *Remonstrance*, *supra* note 1, at par. 11. See also *id.* at par. 9.

[44] *Everson* case, 330 U. S. 1, 12 (1947).

ment for heterodoxy.[45] We have progressed far since Colonial times and Terry McCollum could not be imprisoned for refusing to enroll for religious instruction. But he could be confined alone in a closed room on the far side of the school building. He could not be placed in an actual pillory; but he could be subjected to the public obloquy and ridicule, which was the objective of the pillory, by being placed at a desk in the public corridor to be jeered at and scorned by his schoolmates. He could not be banished from Champaign or even from the public school because of his refusal to conform,[46] but he could be "dumped" into another class for the period of religious instruction.

Terry McCollum's experience was not an isolated or exceptional incident. Many of those who have studied the released time system have found persecution and compulsion employed, with varying degrees of intensity, so frequently as to lead to the conclusion that sooner or later they would be regularly employed wherever the system was in operation. One observer writes:

> Once boards of education sanction religious instruction on school time, school officials tend to assume a responsibility for enforcing enrollment as well as attendance.[47]

Another reports:

> The majority of pupils left in school * * * are penalized for not going to religious instruction. Successive directives have come curtailing their activity. They may not do the things they might be permitted to do during a regular study period. They may not go to the music room, the art room, the sewing room, the typing room, the library, to a teacher for help or to

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[45] Weaver, THE ROAD TO THE FREEDOM OF RELIGION (1944) 56; James, *supra* note 23, at 18.

[46] But see note 48 *infra*, for cases of expulsion because of refusal to participate in religious instruction or worship.

[47] Thayer, RELIGION IN PUBLIC EDUCATION (1947) 89.

make up a test. They may not stir from a 14 by 14 seat for one clock hour.[48]

A cruel dilemma is faced by children of minority religious groups wherever sectarian religion intrudes upon the public school—either being singled out as non-conformists or being subjected to religious dogma at variance with what they learn at home or in their religious schools. In Champaign, as in many other communities, some of them chose the second alternative as the lesser evil (R. 65).[49]

Terry McCollum's regular teacher, Mrs. Taylor, recognized the impelling influence of the fear of "not belonging" and advised appellant to permit her son to participate in the religious education class (R. 135, 192).[50] Mrs. Taylor denied that she exerted any other influence or pressure upon appellant or her son to obtain his participation, although Terry McCollum testified positively that she urged him to enroll on at least three or four occasions (R. 175, 182) and there is at least some corroboration in the record of this type of pressure (R. 195, 214, 217). In the light of the almost complete enrollment for Protestant instruction

[48] Moehlman, THE CHURCH AS EDUCATOR (1947) 114; see also, Beckes, *supra* note 6, at 25. For State cases illustrating the persecution and oppression, principally of Catholic children, resulting from the intrusion of sectarian instruction or worship upon the public school system, see: *State ex rel. Finger* v. *Weedman*, 55 S. D. 343 (1929); *Spiller* v. *Inhabitants of Woburn*, 94 Mass. 127 (1866); *People ex rel. Vollmar* v. *Stanley*, 81 Colo. 276 (1927); *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334 (1910); *Hackett* v. *Brooksville Graded School District*, 120 Ky. 608 (1905); *Billard* v. *Board of Education of Topeka*, 69 Kans. 53 (1904); *Church* v. *Bullock*, 104 Tex. 1 (1908); *Donahoe* v. *Richards*, 38 Me. 376 (1854).

[49] The trial court found that all of the Protestant groups were taught by Miss Chapin and Mrs. Jorgenson and that children of some thirty-one sects, including Catholic, Jewish and Protestant, as well as many children without any particular religious preference, took these courses (R. 65).

[50] See *supra* note 42; see also, Brown, SOCIOLOGY OF CHILDHOOD (1938); Jersild, CHILD DEVELOPMENT AND THE CURRICULUM (1946) ch. 5.

in Mrs. Taylor's classes, notwithstanding the religious diversity of her pupils,[51] and the actual experience with religious instruction on released time even off the public school premises,[52] it is difficult to accept Mrs. Taylor's testimony. Observers of the released time program hostile, neutral and friendly, have found that teachers, principals and public school authorities sympathetic to religious education generally urge pupils and their parents to participate.[53] Even in New York City, with its diversified religious population, regulations prohibiting comment by public school principals or teachers on a child's attendance or non-attendance for religious instruction at church centers are widely disregarded by teachers and principals and pressure upon children to attend is imposed by teachers.[54] Whether or not Mrs. Taylor urged Terry McCollum to enroll for religious education or whether or not any particular public school teacher urges any particular pupil to enroll, the danger of such undue influence is so implicit in the intrusion of sectarianism upon the public school system, that sufferance of such intrusion must be deemed a law respecting an establishment of religion.

It is no answer that appellant resisted the pressures to which she and her son were subjected and did not authorize her son's participation. Constitutionally proscribed conduct does not become permissible because it is inefficacious.

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[51] Considerably less than 50% of the American population is affiliated with any church. 1 CENSUS OF RELIGIOUS BODIES (1936) 86, U. S. Dept. of Commerce.

[52] Davis, *supra* note 11; Public Education Association, *supra* note 6.

[53] Thayer, *supra* note 47, at 89; Beckes, *supra* note 6, at 8; Williamson, *supra* note 9, at 10; Davis, *supra* note 11, at 32, 39; Blair, *A Case For the Weekday Church School*, Frontiers of Democracy (Dec. 15, 1940) 76.

[54] Public Education Association (1943) *supra* note 6, at 7-8; *id.* (1945) *supra* note 6, at 7, 15.

A dissenter's right includes freedom from State-imposed sanctions. The State of Illinois, having enacted a compulsory school attendance law (R. 39) and having established a public school system, may not penalize children attending its public schools for availing themselves of what it has itself recognized as a constitutional "freedom not to worship".[55]

In the struggle for constitutional liberties, the few who have had the courage to resist authority have not been alone in their views. Many who have chosen to yield have shared the views of the bold. There can be no doubt that the virtual unanimity of response in Terry McCollum's class was not the result of a corresponding homogeneity in the composition of his class or of a similar unanimity about the value or merits of instruction in Protestant dogma. Rather, it meant that many parents and children preferred not to invoke the displeasure of the school authorities by protest. But even if only he objected, the constitutional issue would be no different. Religious liberty is not subject to limitation by majority vote.[56]

POINT III

The use of facilities paid for out of tax-raised funds for religious instruction in public schools during regular school hours is prohibited by the Constitution.

We do not consider it necessary to emphasize that the expense incurred by appellees as a result of the released time classes constituted an expenditure of tax-raised funds

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[55] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 340 (1910).

[56] "We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance. True, it is, that no other rule exists, by which any question which may divide a Society, can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority." Madison's *Remonstrance*, *supra* note 1, at par. 1.

for a non-public purpose.[57] Those who seek to ward off sectarian encroachments upon the public school system are not motivated by a desire to prevent the increased taxation which may result from a waste of public funds, but by a wish to maintain, in the words of Jefferson, "a wall of separation between church and State".[58] Resort at an earlier time to the former method of attack resulted from the failure to appreciate clearly that the "Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws respecting an establishment of religion,[59] and that it "protects the citizens against the State itself and all of its creatures—Boards of Education not excepted".[60] Actually, this concept is implicit in the assertion of the public-funds-for-non-public-purpose claim. A State's broad power to define public purpose[61] does not extend to declaring religious instruction to be a public purpose which may validly be supported by public funds, because the Constitution has established, as it were, a conclusive presumption that no public purpose is served by State support of religious instruction. A State may make public business of secular education but it may not, because the First Amendment prohibits laws respecting establishment of religion, make public business of religious instruction. For this reason, we do not stress the oblique attack predicated upon the non-public purpose theory and limit our argument to the basic premise: appellee's action constituted a prohibited law respecting an establishment of religion.

We do not mean to imply that the expenditure of public funds resulting from intrusion of religion upon the public

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[57] *Loan Association* v. *Topeka*, 20 Wall. 655 (1874); *Parkersburg* v. *Brown*, 106 U. S. 487 (1882); *Thompson* v. *Consolidated Gas Utilities Corp.*, 300 U. S. 55 (1937).

[58] *Reynolds* v. *United States*, 98 U. S. 145, 164 (1878).

[59] *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940).

[60] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 637 (1943).

[61] *Green* v. *Frazier*, 253 U. S. 233 (1920).

school system is not a vital factor in this case. As indicated hereafter, we lay great stress thereon. But these expenditures are relevant only because they are elements in the establishment of religion. Madison remonstrated against the imposition of "a small tax for religion" [62] long before it was adjudicated unconstitutional to impose a tax for non-public purposes.

Appellees urge, and the Illinois trial and Supreme Courts found (R. 78-279, 275), that the expense incurred by the public school system as a result of the operation of released time system (wear and tear on furniture, electric current on dark days, etc.) was so slight as to fall within the *de minimis* rule.

We urge, however, with respect to financial and material aid: (1) that the *de minimis* rule has no application where the restraints of the First Amendment are involved, and (2) that the expense to the State revealed by this record was by no means negligible. In assessing these arguments it must be recognized that, had Champaign adopted the illegal policy of teaching religion through its regular classroom teachers, the expense to the town would have been the same, the only difference being that the teachers would have spent their time teaching instead of observing.

A. The *de minimis* rule has no application to the restraints of the First and Fourteenth Amendments on establishment of religion by the State.

The *de minimis* rule has no application where State expenditures are attacked as an aid to religion and hence a law respecting an establishment of religion.

The monetary loss suffered by a taxpayer as a result of a slight waste of public funds may be too insignificant to warrant invoking the judicial process to obtain redress,[63] at least where the object of the expenditure is not expressly prohibited by the Constitution. In respect to matters of

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[62] Eckenrode, *supra* note 23, at 105.

[63] *Cf. Massachusetts* v. *Mellon*, 262 U. S. 447, 486-487 (1923).

religious liberty and separation of church and state, however, the quantity of the monetary appropriation is without significance. When a State makes any appropriation, no matter how slight, for religious purposes, religion has come within the cognizance of Civil Government".[64] Madison well recognized this when he warned: "That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever."[65] It is, we submit, the fact, not the extent, of State aid which controls.[66] This Court has not previously considered the extent of a State expenditure for religion as relevant in determining its constitutionality, even where the attack was based wholly or partly on the public-funds-for-private-purpose theory. In the *Everson* case, the total expenditure of the State of New Jersey for the transportation of parochial school students was only $357.74, disbursed over a six months period,[67] considerably less than the expense incurred by the Champaign Board of Education. *Cochran* v. *Board of Education*[68] involved an expense resulting from the wear

[64] Madison's *Remonstrance*, *supra* note 1, at par. 8.

[65] *Id.* at par. 3.

[66] In *Stein* v. *Brown*, 125 N. Y. Misc. 692 (1925), a system of released time for religious instruction off the public school premises was invalidated because the cards signed by parents were printed by pupils on public school presses. The court said (p. 695): "The fact that no particular denomination was favored or intended so to be by this action of the board of education does not affect the question. The fact is that the property of the board was permitted to be used directly in aid of such schools of religious instruction whose members saw fit to avail themselves of the action taken by the defendants. It seems perfectly clear that it was illegal for the defendants to permit the printing of the cards to be done on its presses." In *People ex rel. Lewis* v. *Graves*, 127 N. Y. Misc. 135, *aff'd* 219 App. Div. 233, *aff'd* 245 N. Y. 195 (1927), the validity of the released time system was sustained and *Stein* v. *Brown* was distinguished on the ground that use of public school presses was not involved in the later case.

[67] Transcript of Record in *Everson* case, p. 49.

[68] 281 U. S. 370 (1930).

and tear on a few textbooks loaned to children, as compared with the regular, weekly use over a five-year period of school classrooms and furniture as in the instant case (R. 61-62). The Court, in the *Cochran* case, disposed of any possible suggestion that the *de minimis* rule might have any relevancy by expressly stating:[69]

> The [Louisiana] Court also stated, *although the point is not of importance in relation to the Federal question*, that it was "only the use of the books that is granted to the children, or, in other words, the books are lent to them." (Emphasis supplied)

Thus the Court recognized that a State's power to lend the use of State property is not constitutionally distinguishable from its power to give the property and that the sole test was whether the parochial school or the child was the actual beneficiary of the State's aid.[70]

The *Everson* and *Cochran* cases were decided on grounds which had no relation to the amounts of money involved. This Court was there called on to decide only whether benefits were being conferred upon children or upon religious institutions, or whether benefits which accrued to the latter were incidental or direct.[71]

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[69] *Id.* at 375.

[70] Would the appellees contend that the system would be constitutionally permissible if the regular instructors conducted the religious courses but the proportionate part of their salary were paid by the religious bodies rather than the public school system?

[71] An illogical extreme of the *Everson* decision may be sought by appellees as is suggested in the following extract from the record (p. 242):

> As a school administrator I believe it would be very inconvenient and impractical to release children from the school in Champaign for the purpose of their going for religious education to church buildings. Because of the distance it would be impracticable in some cases, and would expose the children to danger, because the schools which are located in the north, northwest and southwest parts of our city are quite a distance from churches. It would mean traveling 10 to 15 blocks across busy traffic streets. We have a pedestrian hazard in the City of Champaign. (See also R. 158.).

There can be no doubt, however, that the benefit here conferred is conferred upon religious groups. Those who promote the released time plan justify invoking State aid on the ground that moral behavior and ethical conduct can be assured only, or at least most effectively, by means of religious education and that for reasons of both duty and expediency the State should use its instrumentality, the public school, to effect as widespread a dissemination of religious instruction as possible.[72]

But, if the value of religious education in character training constitutionally justified financial and other State aid to such education, a State's power to grant free textbooks to children attending religious schools would not be limited to secular textbooks [73] nor its power to provide for transportation of children to religious schools limited to those in which secular subjects are also taught.[74]

American Jewry, as we emphasized at the outset, places as high a value as any group on a well-planned and well-directed program of religious education. The framers of our Constitution, however, recognized clearly what some contemporary proponents of released time and similar programs fail to see; that the State aids religion most when it maintains a strict barrier between itself and religion and that any breach in that barrier jeopardizes freedom of religious belief and worship.

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[72] See, *e.g.*, Shaver, *The Weekday Church School—Opportunity and Challenge*, Information Service, Department of Research and Education, Federal Council of Churches of Christ in America (May 29, 1943):

> When parental indifference or other circumstances have failed to give a child a healthy body society has stepped in by means of private or public agencies—to see that he has soundness of health. The same principle has been applied in giving every child his mental training, regardless of whether parents cared or could afford it. Social welfare is jeopardized as much or even more if any child is denied his right to know and to make use of all that society has learned in the area of religion.

[73] *Cochran* v. *Board of Education*, 281 U. S. 370 (1930).

[74] *Everson* case, 330 U. S. 1 (1947).

B. The State expenditures here involved were so substantial as to negate the *de minimis* rule in any case.

Even if we accept the frame of reference adopted by the Illinois court, it is impossible to justify the conclusion reached by it. Its approach, we submit, is unreal and completely ignores basic principles of public school administration and cost accounting.

First it should be noted that, even if the *de minimis* rule applies, the test must be, not the effect of the expenditure on the State and hence the taxpayer, but the effect on the religious institutions which are benefited. Since the rule can be invoked only to show that a given impairment of constitutional prohibitions is negligible, only the extent of that impairment is relevant. Hence, if the religious institution or institutions are substantially benefited, it makes no difference that the expense involved is small in comparison with the total State budget.

There can be no doubt here that the benefit to those religious groups participating in the released time plan is substantial. The released time system is advocated by its proponents as an invaluable device for insuring inculcation of religious principles. To them, the influence of the public school in obtaining attendance at religious instruction is the most attractive feature of the released time plan. The evolution of the plan, from the general cultural program originally envisaged to the integrated plan involving public school time and premises, disclosed by this record can be explained only by the desire to attain increasingly larger attendance at the religious classes. But even on a strictly financial basis, the benefits are substantial.

This case does not involve merely an occasional meeting on school premises, as the Illnois Supreme Court seems to imply (R. 275). It involves the regular use of school rooms and school equipment in all the public schools of Champaign for five years. What is disclosed by the record is not a

slight, occasional use of school property, but a regular, systematic participation in the total operations of the public school system.

The religious education courses are so integrated into the general curriculum of the Champaign public schools that the only adequate way of measuring their cost is by assigning to them a proportionate part of the total educational costs of the public school system.

The average school day in Champaign consists of five and one-quarter hours of teaching (R. 111) or twenty-six and one-quarter hours weekly; not less than one-half an hour weekly is devoted to religious education (R. 62). Hence approximately one-fiftieth of the entire school budget for Champaign must be treated as devoted to religious education. Such an expenditure, involving thousands of dollars,[75] cannot be treated as negligible.

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[75] The record does not disclose the total budget of the Champaign public school system, but, according to the United States Office of Education, during the period involved in this case, 1944-1945, Illinois expended $169.02 annually for each child in the public school system, being the third highest state in this respect. Biennial Survey of Education in the United States, U. S. Office of Education (1944-1946). See also, *Hearings before Committee on Education and Labor on S. 717 and S. 181*, 79th Cong. 1st Sess., (1945) 20, 85-87, 280. At least 850 pupils participated in the religious classes. Assuming that the average expenditure in Champaign is the same as the average for Illinois as a whole, appellees' expenditures for religious education approximated $2,735.47 annually, or $13,677.35 for the five-year period during which the system has been in operation in Champaign. This, of course, is no more than a rough approximation, but no more than a rough approximation is needed for comparison with the $357.74 expended for parochial school transportation in the *Everson* case and to establish that the expense to the Champaign public school system was not negligible.

POINT IV

By permitting religious instruction in the public schools during regular school hours the State is engaging in such instruction.

A. Released time classes in Champaign and elsewhere constitute religious instruction.

We do not believe it necessary to justify the contention that a State may not itself inculcate the tenets of any particular religion. We do not mean that public schools may not engage in teaching, the purpose of which is to impart information about and appreciation of religion and religions, rather than to inculcate particular religious beliefs.[76] Without necessarily conceding the point such teaching possibly may be included in the public school curriculum without violating constitutional bans. What is involved here, however, as well as wherever the released time program is carried on, is the *inculcation* of religion (R. 94-105, 139-143, 151).

There can be little doubt that what the record discloses and what is universally given in released time classes is sectarian religious instruction.[77] The trial court found that:

> The Jewish classes of course would deny the divinity of Jesus Christ. The teaching in the Catholic classes of course explains to Catholic pupils the teaching of Catholic religion, and are not shared by other students

[76] See R. 219-220 for an illustration of such teaching.

[77] The content and method of the Protestant teaching disclosed by the record are substantially similar to that recommended by the International Council on Religious Education and used in most Protestant released time classes. See: Religious Education, *The Protestant Program of Teaching* (Jan.-Feb., 1945) 16-22; International Council of Religious Education, *supra* note 27, at 12-15; Davis, *supra* note 11, at 50-54. For content and method of Catholic teaching in released time programs, see: Collins, *Released Time for Religious Education, American Ecclesiastical Review* (Aug., 1946) 133.

who are Protestants or Jews. The teachings in the Protestant classes would undoubtedly, from the evidence, teach some doctrines that would not be accepted by the other two religions (R. 66).

Indeed, the record establishes that even in the Protestant classes, the teachings would not be accepted by a number of important Protestant denominations (R. 121-123, 124-125, 135, 149, 218-221).[78]

B. The State may not participate in religious instruction.

It is obvious that under the First Amendment the Federal Government could not itself conduct religious instruction. Disestablishment in Virginia, and consequently in the Federal Government, came about as a result of the defeat of an Assessment Bill introduced because "the general diffusion of Christian knowledge * * * cannot be effected without a competent provision for learned teachers".[79] If the First Amendment means anything, the Federal Government may not make "provision for learned teachers" of religion, and *a fortiori* may not itself engage teachers of religion or otherwise inculcate religious beliefs.[80] Since the "Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact" laws respecting an establishment of religion,[81] it is equally obvi-

[78] There are at least 256 different religious denominations with churches in this country. 1 CENSUS OF RELIGIOUS BODIES (1936) 9, U. S. Dept. of Commerce. It is probably impossible to teach even the Bible in a manner acceptable to all the Protestant denominations. Moehlman, *supra* note 48, ch. VIII.

[79] Preamble to Assessment Bill, annexed as supplemental appendix in *Everson* case, 330 U. S. 1 (1947).

[80] The First Amendment, in the form originally passed by the Senate on September 9, 1790, read in part as follows: "Congress shall make no law establishing articles of faith, or a mode of worship, or prohibiting the free exercise of religion." Records of the U. S. Senate, 1A-C2, U. S. Nat. Archives, quoted by Mr. Justice Reed, dissenting in *Jones* v. *Opelika*, 319 U. S. 105, 124 (1943) footnote 6.

[81] *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940).

ous that the public school authorities of Champaign could not themselves include religious instruction as part of the regular curriculum.

The Supreme Court of Illinois has itself recognized that "religious instruction * * * is not within the province of civil government".[82]

Nor would it be material that attendance at the religious instruction classes might not be compulsory. Compulsory attendance was no longer an issue when Jefferson and Madison finally won the long struggle for disestablishment by the adoption of the First Amendment. Long before disestablishment was effected in Virginia by the defeat of the Assessment Bill and the enactment of the Bill for Religious Liberty, the statute requiring attendance at church worship was repealed.[83] In any event, compulsory or not, it can hardly be doubted that participating in the inculcating of the tenets of religion is aid to religion within the proscription of the *Everson* case.

It would, we submit, be equally immaterial that the public school authorities offered separate religious instruction for each of the sects represented in the community. As we have demonstrated, under the Federal Constitution, a State is incompetent to aid all religions, even if none is singled out for preferential treatment.

C. The State participates in the religious instruction in released time classes in Champaign and elsewhere.

We submit that the system of religious instruction prevailing in Champaign, as well as wherever religious instruction is given within the public school building during school hours, cannot help but involve the participation of the public school system in religious instruction. This inevitably results when the State permits use of its public school system to inculcate religious beliefs.

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[82] *People ex rel. Ring* v. *Board of Education*, 245 Ill. 334, 343 (1910).

[83] *Cobb, supra* note 42, at 491-493.

The fact that sectarian dogma is taught within the public school building with the approval of the public school authorities helps give these teachings, as far as the child is concerned, a cloak of unimpeachable authority. The common disclaimer that the views of a writer or commentator do not necessarily reflect those of the publisher or sponsor is ample evidence that even an adult would make such an assumption. With children such an assumption is not only reasonable, it may well be inevitable. A child, as any parent knows, can think of no more convincing authority for a statement than the fact that "he learned it in school".[84]

The presence of the regular teacher in the classroom during the religious instruction period serves further to give to sectarian tenets the stamp of the public school's authority and approval.

The record establishes that Mrs. Taylor, the secular teacher, frequently, if not customarily, remained at her desk in the classroom while religious instruction class was being conducted.[85] Other regular teachers followed the same practice (R. 92).

To the average child, the public school teacher is the sovereign of the classroom. He cannot conceive that the teacher would permit statements to be made in the classroom, unless she was prepared to vouch for their literal and factual truth.[86] Admittedly, as far as the record

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[84] *Cf.* Nimkoff, *supra* note 39, at 203; Zachry, EMOTION AND CONDUCT IN ADOLESCENCE (1940) 277.

[85] She testified:

> When the art supervisor comes in I turn the pupils over to her. She teaches a lesson in art. While she is teaching I observe. I do the same thing when the music supervisor comes in. At times I do the same thing when the religious education teacher comes in, not all the time (R. 131).
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> * * * * * * *
>
> Part of the time I observed religious education lessons. To a certain extent I observed what was being taught. * * * (R. 133).

[86] *Cf.* Schneiderman, DEMOCRATIC EDUCATION IN PRACTICE (1945) 44-45. See also *supra* note 84.

reveals, the secular teacher does not participate orally in the religious instruction. In view of the relationship of confidence and trust between teacher and students, however, this is hardly material. The teacher's failure to disavow is as eloquent as her affirmative approval would be.

The substantial effect, if not the intent, of the released time program as revealed in the record is to equate in the mind of the child the religious class with other classes. Religious instruction, like all other instruction, is given in the public school building and in the same classrooms (R. 133). The pupils occupy the same seats as they do in the secular classes (R. 133). Following the practice in other classes, a special teacher enters the classroom while the regular teacher remains to observe (R. 132). Because the religious instruction classes are conducted at various periods during the school day rather than at the end of the day, the implication that they are distinct or different from other courses is avoided (R. 132, 147). The children are under the supervision of the same public school authorities while taking religious instruction, just as they are while being taught other subjects (R. 243). The cards for enrollment in the religious instruction classes are distributed and collected by the regular public school teachers (R. 94, 133, 148, 152, 171, 256). When a child is absent from religious instruction, the religious teacher turns in a slip, furnished by the school, "just like any other teacher would to the superintendent's office" (R. 224).

Every phase of the released time program thus serves to involve the authority and facilities of the public school system and to place the authority of the latter behind the religious instruction as behind other classes. This equalization of religious instruction is intentional rather than accidental, for the principal purpose of the released time program is to make religious instruction an integral part

of the general education provided by the public school system.[87]

The inevitable effect of this equalization and integration, we therefore submit, is that the public school system is engaged in constitutionally-forbidden sectarian instruction.

In addition, the public school system partjcipates in the religious instruction by passing upon the qualifications of the religious teachers, supervising their activities (R. 127) and censoring their teachings (R. 162).

CONCLUSION

Since the adoption of the First Amendment, the United States has escaped much of the bitter religious conflict and sectarian strife which have riven other parts of the world and driven men to violence and bloodshed. That good fortune has been due largely to two of the truly great contributions the American people has made to western civilization: the concept of the separation of church and state and the free public school system. The first, by protecting religion against the intrusion of civil authority and by making it impossible for the state to become a battleground for sectarian preference and favor, has preserved both our political freedom and our religious freedom. The second, by providing for the education of our children on terms of complete equality and without cognizance of their differences in religious beliefs or disbeliefs, has been the cornerstone of our American democracy. The intrusion of sectarianism upon the public school system, as we have shown

[87] Gove, RELIGIOUS EDUCATION ON PUBLIC SCHOOL TIME (1926) 19; McPherson, *The Protestant Program of Teaching*, Religious Education (Jan.-Feb., 1943) 22; Blair, *supra* note 53, at 76; "The one big contribution which was claimed for weekday church schools and still is held, was that they would help make religion an integral part of the public school experiences of boys and girls."

in this brief, both threatens the separation of church and state and challenges the traditional integrity of the public schools. That intrusion, if permitted and sanctioned as sought by appellees, will destroy the institutions which have preserved religious and political freedom in the United States and which have prevented religious warfare in this nation. We believe that continued preservation of the victory which the Fathers of the Constitution won for political and religious liberty requires reversal of the judgment herein.

October 24, 1947.

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